

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE  
May 23, 2006 Session

**IN RE: C.B.W.**

**Appeal from the Juvenile Court for Rutherford County  
No. TC476 Donna Scott, Judge**

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**No. M2005-01817-COA-R3-PT - Filed on June 26, 2006**

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The maternal grandmother of a four year old girl filed a petition to terminate the parental rights of the child's young mother on the ground of abandonment. The trial court found that abandonment had been proven by clear and convincing evidence, because the mother had failed to visit with the child for at least four months prior to the filing of the termination petition. However, the evidence also showed that during the time between the filing of the petition and its hearing, the mother turned her life around and also established a warm relationship with her daughter. Nonetheless, the trial court granted the petition, declaring it to be in the child's best interest that the mother's rights be terminated. We reverse because we do not find clear and convincing evidence in the record that it is in the best interest of the child to sever the parental relationship.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Juvenile Court  
Reversed**

PATRICIA J. COTTRELL, J., delivered the opinion of the court, in which WILLIAM C. KOCH, JR., P.J., M.S., and WILLIAM B. CAIN, J., joined.

Dana C. McLendon III, Franklin, Tennessee, for the appellant, A.L.W.

Bert W. McCarter, Murfreesboro, Tennessee, for the appellee, D.W.

**OPINION**

**I. FACTS**

Although there is no dispute as to most of the facts of this case, the conclusions to be drawn from those facts are disputed. A.L.W. ("Mother") was a sixteen year old high school student when she became pregnant with C.B.W., the little girl who is at the center of this case. A.L.W.'s parents and other family members were disappointed by this development, and their relationship with A.L.W. became strained. C.B.W. was born on July 7, 2001, and A.L.W.'s mother, D.W. ("Grandmother"), immediately took over the care of the infant.

The child had severe asthma and required breathing treatments, which Grandmother administered. Mother did not participate very much in the care of her daughter and apparently never learned how to administer the breathing treatments properly. Grandmother and her husband (A.L.W.'s father) had divorced shortly after C.B.W. was born. During this time, most of the family members viewed Mother's attention to and care of C.B.W. as lacking. At some point, Mother moved in with her father, but, after a few months, a growing estrangement between them led Mother to move out of his home and to move in with an ex-boyfriend at his parents' home. Mother graduated from high school and took a job at the VA hospital. She later worked as a teller at a bank. Her work enabled her to provide medical insurance for C.B.W., which she has continued throughout these proceedings.

Around the time Mother left Grandmother's house, on November 7, 2003, Grandmother filed a petition in the Juvenile Court of Rutherford County for legal custody of her granddaughter, contending that the child was dependent and neglected. The court granted the Grandmother a protective custody order on the same day. The parties subsequently reached an agreement which was ratified by the court on December 3, 2003. It provided for continued temporary custody with Grandmother for all purposes and included provisions for supervised visitation by Mother.

Under the terms of the order, supervised visitation could be exercised by Mother on 48 hours notice, but could only take place in "a suitable home environment." The court declared that the only suitable home environments for visitation purposes would be Grandmother's home, the grandfather's home, the home of the maternal aunt and uncle, or the great-grandmother's home. Mother was ordered to continue to provide insurance to C.B.W. The issue of child support was reserved.

The record shows that Mother did not take advantage of her visitation rights in the months following the filing of the custody order and that eventually she avoided contact with her family members. On July 16, 2004, Grandmother filed a petition for termination of Mother's parental rights, contending that Mother had abandoned the child by failing to visit or contact her, even though she had the means and the legal right to exercise such visitation.

The termination petition was apparently a wake-up call for Mother. A few days after it was served, she contacted B.P., the high school boyfriend whom she had long believed to be the father of C.B.W. He told her that he still loved her, and after heartfelt conversations, they decided to marry. After marrying, they both took parenting classes and bought a house in Bon Aqua which included a suitably furnished bedroom for C.B.W.

Mother filed a response and counter-petition to the termination petition, and her new husband filed a motion to intervene to pursue his rights as the child's father. Mother claimed that she did not visit C.B.W. after the juvenile court's custody order was filed because she did not understand the order and she thought it forbade her from visiting her child. Mother and B.P. both alleged that Grandmother knew that B.P. was the father of C.B.W., but that Grandmother rebuffed all his efforts to establish contact with the child and to bring gifts to her. B.P. withdrew his motion to intervene when DNA testing proved he was not the biological father.

Mother's counter-petition asked for custody and/or visitation. The day after Mother filed her response and counter-petition, Grandmother filed a motion to suspend all visitation pending the final hearing of the case. Mother was able to visit briefly with C.B.W. at least three times at the home of her aunt and uncle before the motion was heard. The trial court ultimately denied the motion, and the parties subsequently managed to reach a new visitation agreement without the participation of the court. Under that agreement, Mother and C.B.W. were to meet for one hour each Sunday for supervised visitation at a neutral location. At the Grandmother's insistence, the Exchange Club Family Center in Murfreesboro became the chosen location, even though that location was distant from Mother's home.

Mother was very consistent with this visitation. Every Sunday she drove across three counties, from her home in Bon Aqua to Murfreesboro and paid a \$40 fee for each one hour visit with her daughter. She even went when she was eight months pregnant with her second child. Mother and C.B.W. played together in an appropriate way, and Mother gave her daughter little gifts like Play Dough and sidewalk chalk. Supervised visitation monitors for the Exchange Club took detailed notes of each visit.

The notes indicate that Mother and the child both enjoyed the visits and experienced loving interactions, including hugs and kisses upon arrival and upon parting. They also show that C.B.W. called Mother by her first name. Grandmother cancelled a few of these visits because she had other plans for C.B.W. on those particular days,<sup>1</sup> but despite requests by Mother she refused to reschedule those visits for different days.<sup>2</sup>

## **II. PROCEEDINGS IN THE TRIAL COURT**

The final hearing on the termination petition began on June 21, 2005, and lasted two days. C.B.W. was just a few weeks shy of her fourth birthday at the time of the hearing, and Mother and her husband, B.P., had a new baby, who was just two weeks old. In addition to the parties, testifying witnesses included Mother's father, uncle and aunt, B.P. and his stepmother, a supervisor from the Exchange Club, and the CASA (Court Appointed Special Advocates for Children) representative.

The testimony of Mother's family members made it evident that the resentment created by Mother's earlier neglect of her child and her estrangement from her family had not disappeared. Perhaps because of a lack of communication, the family members were only vaguely aware of the improvements Mother had made in her life, and they remained wary of B.P., her new husband. Grandmother made it clear in her testimony that she did not care for B.P.

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<sup>1</sup>These plans included visits to a theme park and a birthday party for Grandmother's sister. In her testimony, Grandmother was unapologetic for canceling these visits with Mother.

<sup>2</sup>Originally, Grandmother saw no reason to reschedule and, in fact, told the Exchange Club staffer that the visits were to be on Sundays only. At trial, Grandmother testified that after her deposition, although she cancelled additional visits, she tried to reschedule them but the Exchange Club was unable to accommodate that request.

Some family members had developed a relationship with the child, facilitated by regular contact. Grandmother allowed her divorced husband to have visitation with C.B.W. every Friday night. Mother's maternal aunt and uncle, who have no children of their own, were able to see C.B.W. almost every weekend.

As previously noted, the family members had very limited awareness of Mother's current situation, and they remained skeptical that she had really changed. They unanimously testified that in their opinions, termination of Mother's parental rights would be in C.B.W.'s best interest. Questioning revealed that each of those opinions was based on Mother's conduct prior to the filing of the termination petition and on the excellent care that Grandmother had always furnished for the child.

Susan McGuigan, the Executive Director of CASA of Rutherford County submitted a report she had prepared for this case and also took the stand. She testified that she was able to contact all the adults involved in the case, and that she had observed Mother interact with C.B.W. twice at the home of her maternal aunt and uncle. She had also observed Grandmother interact with C.B.W. on two occasions. She found all interactions to be appropriate. She also visited Mother's home in Bon Aqua and Grandmother's home in Murfreesboro. Both homes were described as suitable for a young child – clean, attractively furnished, and with no safety hazards. Ms. McGuigan's last contact with Mother was in October of 2003, nine months before the termination hearing.

In her report and on the stand, Ms. McGuigan recommended that Mother's parental rights be terminated so Grandmother could adopt C.B.W. Her recommendation was based on Mother's neglect of the child prior to the filing of the termination petition. She also placed the permanence supplied by adoption as the highest priority.

On cross-examination, Mother's attorney probed Ms. McGuigan's reasoning. By his questions he suggested that she was unwilling to consider the possibility that the positive changes Mother had accomplished in her life might make it in C.B.W.'s best interest to strengthen or regain her relationship with Mother.

Mr. McLendon: It appears to me that nothing that has happened in the last twelve months could set off what we all know was the case before July of 2004 in other words that no amount of hard work, effort, diligence, and sincerity on the part of [Mother] can overcome that, at least as far as you are concerned.

Ms. McGuigan: I guess that's what I'm saying.

When Mother took the stand, Grandmother's attorney focused his questions on Mother's actions prior to the filing of the termination petition. She acknowledged her lack of involvement in her daughter's life up until that time and her estrangement from her family. However, it was her

view that Grandmother had shunted her aside when she wanted to do things for C.B.W. and that her relatives had turned their backs on her. When asked why she didn't take parenting classes as was recommended to her after the November 2003 custody hearing, Mother replied, "I was stupid."

Mother's attorney questioned her about her current circumstances. Mother testified that she was happily married and that she and her husband both have full-time jobs (the husband has a part-time job as well). They live in a three bedroom house on an acre of land, and are financially and emotionally capable of caring for their new baby. The husband testified that he also wishes to serve as a father to C.B.W. and would treat her as his own daughter. Since B.P. (like C.B.W.) suffers from asthma, they have taken precautions to keep the air in the house free of irritants. Husband and wife have now completed a multi-week parenting course. Mother teaches Sunday School to pre-schoolers and works in the church nursery.

Grandmother's testimony revealed that since the birth of C.B.W., she has been torn between the wish that Mother would straighten out her life and the need to protect C.B.W. from the possibility that she would not. Because of the child's asthma, Grandmother testified that her granddaughter's health had become her primary concern. She testified that she still hoped that things could be mended and that Mother and C.B.W. could have a relationship; however, in her opinion it was in the child's best interest that Mother's parental rights be terminated. She also stated she had filed the petition to terminate Mother's rights in the hope it would be a wake-up call for Mother. Mother's post-petition actions and her current situation, however, did not apparently satisfy Grandmother to the point that she would abandon her petition. She continued to state that termination of Mother's rights is in C.B.W.'s best interest at this time.

In closing arguments, Mother's attorney emphasized the positive changes his client had made in her life, and argued that Grandmother was confusing her own wishes with C.B.W.'s best interest. Grandmother's attorney focused almost all his argument on the proof that the Mother had abandoned her child prior to the filing of the termination petition. He discounted any changes after that date, stating "what the law is concerned about is what's happened prior to July 16, 2004."

The guardian ad litem likewise focused on the same issue, noting that "it's not a defense to abandonment that somebody's changed their life after the filing of the petition. It's not a defense that they had a wake-up call." The guardian ad litem also noted that there was no expert testimony that it would not be in C.B.W.'s best interest for the termination not to occur, and that the CASA representative, whom he characterized as "the closest thing we have to any kind of expert" concurred with the family members that termination would be in the child's best interest.

At the conclusion of testimony and closing arguments, the court announced its decision. The trial judge acknowledged that Mother had made significant positive changes in her life, but stated that she did not believe those changes outweighed the effect of the nine statutory factors set out in Tenn. Code Ann. § 36-1-113(i) to guide the courts in determining best interest in termination proceedings. After discussing those factors, the judge concluded "with a very heavy heart" that there was clear and convincing evidence that termination of the Mother's rights was in the child's

best interest. The court's decision was memorialized in an order filed July 12, 2005, which included the court's findings of facts. This appeal followed.<sup>3</sup>

### III. TERMINATION OF PARENTAL RIGHTS

A court may terminate a person's parental rights only if the party seeking termination proves by clear and convincing evidence (1) the existence of at least one statutory ground and (2) that termination of the parent's rights is in the best interest of the child. Tenn. Code Ann. § 36-6-113(c); *In re F.R.R., III*, \_\_\_ S.W.2d \_\_\_, 2006 WL 1215134, at \*2 (Tenn. May 8, 2006); *In re Valentine*, 79 S.W.3d 539, 546 (Tenn. 2002). The higher evidentiary standard, as well as procedural safeguards, exist to prevent unwarranted government interference, through the court's orders, with a parent's fundamental and constitutionally protected right to the care and custody of his or her children. *Santosky v. Kramer*, 455 U.S. 745, 769, 102 S. Ct. 1388, 1403 (1982) (holding that because of the fundamental nature of the interest at stake and the risk of erroneous decision with grievous consequences in termination proceedings, due process requires an evidentiary standard at least as stringent as clear and convincing evidence)<sup>4</sup>; *see also In Re Adoption of a Female Child*, 896 S.W.2d 546, 547 (Tenn.1995); *Nale v. Robertson*, 871 S.W.2d 674, 678 (Tenn.1994) (discussing the fundamental constitutional rights of parents).

Our legislature has identified those situations in which the state's interest in the welfare of a child may justify interference with a parent's constitutional rights by setting forth grounds on which termination proceedings can be brought. Tenn. Code Ann. § 36-1-113(g). The statutes on termination of parental rights provide the only authority for a court to terminate a parent's rights. *Osborn v. Marr*, 127 S.W.3d 737, 739 (Tenn. 2004). Thus, parental rights may be terminated only where a statutorily defined ground exists. Tenn. Code Ann. § 36-1-113(c)(1); *Jones v. Garrett*, 92 S.W.3d 835, 838 (Tenn. 2002); *In re M.W.A.*, 980 S.W.2d 620, 622 (Tenn. Ct. App. 1998). To support the termination of parental rights, only one ground need be proved, so long as it is proved by clear and convincing evidence. *In the Matter of D.L.B.*, 118 S.W.3d 360, 367 (Tenn. 2003).

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<sup>3</sup>The hearing of this appeal was delayed because of problems preparing the transcript of the evidence. No court reporter was present during the juvenile court's proceedings, and the CD-ROM audio recording that was prepared at that time proved difficult to transcribe. This case was originally scheduled to be heard on this Court's November 2005 docket, but had to be delayed until May 23, 2006, when an acceptable transcript was finally available.

<sup>4</sup>In *Santosky* the Court actually examined only one type of termination proceeding created by applicable state statutes: the first phase (the "factfinding" stage) of a State-initiated termination action where the children have been removed from the parents' custody for a prolonged period. Nonetheless, the Tennessee Supreme Court has interpreted Tenn. Code Ann. § 36-1-113(c) as requiring clear and convincing evidence both of grounds and best interest. *In re Valentine*, 79 S.W.3d at 546. Further, our statutes clearly apply whether a private party or the State brings the petition for termination. *See, e.g., In re D.A.H.*, 142 S.W.3d 267 (Tenn. 2004).

In the case before us, the trial court found that Grandmother had shown by clear and convincing evidence the existence of the ground of abandonment.<sup>5</sup> There is no dispute on appeal that the trial court's finding of abandonment was correct and supported by the requisite standard of proof.

However, proof of grounds by clear and convincing evidence is not sufficient, in and of itself, to support the termination of a parent's rights. In other words, existence of a ground does not inexorably lead to the conclusion that termination of a parent's rights is in the best interest of the child. *In re Audrey S. & Victoria L.*, 182 S.W.3d 838, 876 (Tenn. Ct. App. 2005); *White v. Moody*, 171 S.W.3d 187 (Tenn. Ct. App. 2004). To conclude otherwise would render meaningless the statutory requirement that both grounds and best interest be proved.

#### IV. BEST INTERESTS

The determinative issue in this case is whether Grandmother sustained her burden and proved by clear and convincing evidence that termination of Mother's parental rights was in C.B.W.'s best interest. *In re Valentine*, 79 S.W.3d at 546. The determination of a child's best interest is necessarily fact specific; individualized decision-making in termination cases is constitutionally required. *In re Swanson*, 2 S.W.3d 180, 188 (Tenn. 1999). Ascertaining a child's best interest in a termination of parental rights case is a fact-intensive inquiry. *In re Audrey S. & Victoria L.*, 182 S.W.3d at 878.

Consequently, courts must examine the circumstances of each child and make the determination, as defined in the statute, of whether "termination of the parent's rights . . . is in the best interests of the child." Tenn. Code Ann. § 36-1-113(c)(2). Because denial of a petition to terminate parental rights does not in and of itself affect the custody of a child, *In re Valentine*, 79 S.W.3d at 550, the court's task is not to choose between two home situations. Instead, the inquiry should address itself to the impact on the child of a decision that has the legal effect of reducing the parent to the role of a complete stranger. Termination of a parent's rights severs "forever all legal

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<sup>5</sup> Abandonment is one of the statutory grounds for termination set out in Tenn. Code Ann. § 36-1-113(g). Several possible definitions of abandonment are found in Tenn. Code Ann. § 36-1-102. The relevant definition for the purposes of this case reads as follows:

For a period of four (4) consecutive months immediately preceding the filing of a proceeding or pleading to terminate the parental rights of the parent(s) or guardian(s) of the child who is the subject of the petition for termination of parental rights or adoption, that the parent(s) or guardian(s) either have willfully failed to visit or have willfully failed to support or have willfully failed to make reasonable payments toward the support of the child.

Tenn. Code Ann. § 36-1-102(1)(A)(i).

rights and obligations of the parent.” Tenn. Code Ann. § 36-1-113(l)(1). A parent whose rights are terminated has “no right thereafter to have any relationship, legal or otherwise, with the child.” *Id.*<sup>6</sup>

While the parent’s rights are the focus in the grounds stage, the best interest of the child becomes the paramount consideration after the court has determined that at least one ground has been proved by clear and convincing evidence. *In re Audrey S. & Victoria L.*, 182 S.W.3d at 876. Although some evidence may be relevant to both grounds and best interest, different considerations apply to the two requirements. One important distinction is that grounds are generally established on the basis of the parent’s past actions. Best interest, by its nature, must focus on the current situation and, to some extent, is based on a prediction of future events.

In that regard, although a finding that the ground of abandonment has been proved cannot be escaped by visiting or paying support for a child after a petition to terminate parental rights is filed, Tenn. Code Ann. § 36-1-102(F), courts are not precluded from considering post-petition events in determining where the child’s best interests lie. To the contrary, courts should not disregard any evidence about the child’s situation at the time the best interest determination is made. In the case before us, that includes the fact that C.B.W. had been visiting with Mother on a regular basis for almost a year.

To help courts with the task of determining whether termination of parental rights is in the best interest of the children involved, our legislature has set out a list of factors for them to consider in their analysis. Tenn. Code Ann. § 36-1-113(i). As the statute makes clear, however, these factors are not exhaustive. The court should consider any factor relevant to whether or not termination of the parent’s rights is in the child’s best interest, whether or not that factor is listed in the statute. The statute reads:

(i) In determining whether termination of parental or guardianship rights is in the best interest of the child pursuant to this part, the court shall consider, but is not limited to, the following:

(1) Whether the parent or guardian has made such an adjustment of circumstance, conduct, or conditions as to make it safe and in the child's best interest to be in the home of the parent or guardian;

(2) Whether the parent or guardian has failed to effect a lasting adjustment after reasonable efforts by available social services agencies for such duration of time that lasting adjustment does not reasonably appear possible;

(3) Whether the parent or guardian has maintained regular visitation or other contact with the child;

(4) Whether a meaningful relationship has otherwise been established between the parent or guardian and the child;

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<sup>6</sup>Consequently, while Grandmother may hope that Mother and C.B.W. will one day have a relationship, her action in pursuing termination of Mother’s rights would, if successful, foreclose any action by Mother to ensure such a relationship.



(5) The effect a change of caretakers and physical environment is likely to have on the child's emotional, psychological and medical condition;

(6) Whether the parent or guardian, or other person residing with the parent or guardian, has shown brutality, physical, sexual, emotional or psychological abuse, or neglect toward the child, or another child or adult in the family or household;

(7) Whether the physical environment of the parent's or guardian's home is healthy and safe, whether there is criminal activity in the home, or whether there is such use of alcohol or controlled substances as may render the parent or guardian consistently unable to care for the child in a safe and stable manner;

(8) Whether the parent's or guardian's mental and/or emotional status would be detrimental to the child or prevent the parent or guardian from effectively providing safe and stable care and supervision for the child; or

(9) Whether the parent or guardian has paid child support consistent with the child support guidelines promulgated by the department pursuant to § 36-5-101.

Tenn. Code Ann. § 36-1-113(i).

A review of this list demonstrates that many of the factors are clearly meant to be applied in situations where a child has been removed from a parent's home upon request by the Department of Children's Services and reunification of the family has not been possible. Because long term foster care, with the instability and insecurity inherent therein, is disfavored under the public policy established by the legislature and is seldom in a child's best interest, many of the statutory best interest factors relate to the likelihood that the child will be able to leave foster care and return to the parent's home in the near future. If that likelihood is remote, the best interest of the child often lies in termination of parental rights so that the child can attain the security and stability of a permanent home through adoption. *See In re M.E.W & J.W.W*, No M2003-01739-COA-R3-PT, 2004 WL 865840, at \* 10-11 (discussing holdings that if long term foster care is the alternative to termination of parental rights, termination is in the best interest of the child).

Because of the wording of some of these factors, it is easy to understand why courts, attorneys, and parties often appear to be under the impression that a denial of termination results in an automatic change of custody to the biological parent.<sup>7</sup> The first factor, for example, has to do with conditions in the parent's home so "as to make it safe and in the child's best interest to be in the home of the parent or guardian." Similarly, the seventh factor has to do with the environment in the parent's home. Another requires consideration of the effect on the child of a change of caretakers. Tenn. Code Ann. § 36-1-113(i)(5). Obviously, whether return to the parent's home is likely to be possible in the near future is an important part of the best interest analysis when the alternative is long term foster care. So is the effect on the child of a reunification in the near future. If return to the parent in the short term is not likely or beneficial, terminating rights so that the child can be adopted is in the child's interest. Denying a petition to terminate in that situation does not,

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<sup>7</sup> Some of the arguments, testimony, and statements in the hearing below indicate such was the case here with at least some of the participants.

however, result in an automatic return of the children to the parent's custody. Neither does it in the situation before us.

The circumstances described above, which many of the statutory factors are designed to address, is not the situation in the case before us. C.B.W. is not now and has never been in foster care. She does not face the uncertain future involved in long term foster care. Instead, the child has been in a stable and secure environment with Grandmother and will continue in that environment absent court action changing custody.<sup>8</sup>

With these observations in mind, we will examine all the relevant factors, including those not specifically listed in Tenn. Code Ann. § 36-1-113(i). Herein, the trial court dutifully went through the statutory factors one by one and made findings as to each.

As to factors one and two, the court acknowledged that Mother had made an adjustment of circumstances that made it safe for the child to be in her home, but it questioned whether that adjustment was lasting, given the short period of time involved, and the fact that she had to rely on a marriage and therefore on the support of another person. Factor number six was inapplicable. As to factors seven and eight (the physical environment of the parent's home and the parent's emotional state) the court stated that these factors were equal for both parties, so "this court is not going to give weight to either one side or the other." On factor nine, the trial court found that Mother had failed to support her child after entry of the agreed order on temporary custody. We note that the order specifically reserved the issue of support and that Mother did maintain medical insurance on C.B.W.

The trial court appears to have accorded the greatest importance to three of the statutory factors, which it found weighed against Mother: the limited visitation, the absence of a meaningful parent/child relationship, and the effect a change of caretakers would be likely to have on the child.

Discussing factor three, the court observed that the Mother had maintained regular visitation with the child, stating, "[s]he has; one hour, for the past several months at the Exchange Club, at her expense, but she could have had more." The trial court apparently thought Mother could have insisted on greater visitation, but did not address Grandmother's insistence as to the location and day for the visits and initial refusal to reschedule visits that Grandmother canceled.

The court opined that one hour per week visitation did not effect a lasting relationship, and, as to the fourth factor, *i.e.*, whether a meaningful relationship had been established between parent

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<sup>8</sup> Mother was not asking the court for a change of custody at the time the court rendered its decision on the termination petition. Although Mother originally counter-petitioned for custody, she abandoned that request at or before the hearing. The standards for change of custody involving a biological parent and a non-parent with custody are set out in a series of opinions: *Cranston v. Combs*, 106 S.W.3d 641 (Tenn. 2003); *Kendrick v. Shoemaker*, 90 S.W.3d 566 (Tenn. 2002); *Blair v. Badenhope*, 77 S.W.3d 137 (Tenn. 2002); *see also In the Matter of K.C. Jr.*, No M2005-00633-COA-R3-PT, 1995 WL 2853877 (Tenn. Ct. App. Oct. 4, 2005)(no Tenn. R. App. P. 11 application filed). We do not intend to imply that the order giving Grandmother custody herein meets or does not meet the requirements necessary to trigger the material change of circumstances standard, since that issue is not before us.

and child, the court said, “I find by clear and convincing evidence that she hasn’t got a relationship as parent and child. She has a relationship with someone that comes and plays with her one hour every week, but not the bond of a parent and child.”

The court noted that the child did not know Mother as her mother and did not refer to her as her mother. The evidence is not conclusive whether C.B.W. knew that Mother was her mother. Further, she apparently did not call anyone “Mommy” or a similar name, but referred to Grandmother by a family nickname. The Exchange Club supervisor, however, noted warm, affectionate, and spontaneous interactions between Mother and the child.

The trial court stated that it had to give great weight to factor number five. The court cited the child’s asthma and said that it found “by clear and convincing evidence that if I took [C.B.W.] away from [Grandmother], it would not just be emotionally, it would be psychological problems . . . I think it would be detrimental to take [C.B.W.] out of the possession of [Grandmother and her family members].” While that may or may not be the case, that was simply not the question facing the court. There was no pending request to change custody of C.B.W.

Mother’s attorney had questioned her at length as to what she would do if the termination petition was dismissed. She stated that she might eventually like the court to grant her custody, but that she did not want to impose any sudden or upsetting changes on her daughter. Instead, she expressed the hope that the court could give them the opportunity to spend increasing amounts of time together, and allow the little girl an opportunity to become acquainted with her entire family, including her new sister.<sup>9</sup>

As set out earlier, a party seeking to terminate a parent’s rights has the burden to prove by clear and convincing evidence that termination is in the child’s best interest. The “clear and convincing evidence” standard is more exacting than the “preponderance of the evidence” standard. *O’Daniel v. Messier*, 905 S.W.2d 182, 188 (Tenn. Ct. App. 1995); *Brandon v. Wright*, 838 S.W.2d 532, 536 (Tenn. Ct. App. 1992). In contrast to the preponderance of the evidence standard, clear and convincing evidence should demonstrate that the truth of the facts asserted is highly probable as opposed to merely more probable than not. *Teter v. Republic Parking System, Inc.*, 181 S.W.3d 330, 341 (Tenn. 2005); *Lettner v. Plummer*, 559 S.W.2d 785, 787 (Tenn. 1997); *In re C.W.W.*, 37 S.W.3d 467, 474 (Tenn. Ct. App. 2000).

In order to be clear and convincing, the evidence must eliminate any serious or substantial doubt about the correctness of the conclusions to be drawn from the evidence. *Teter*, 181 S.W.3d at 341; *In re Valentine*, 79 S.W.3d at 546; *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 901 n. 3 (Tenn. 1992).

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<sup>9</sup>We note that while a reversion of custody to the natural parent does not automatically follow from the dismissal of a petition to terminate parental rights, the natural parent is entitled to petition the court to grant her the rights that are normally accorded to non-custodial parents and which are set out in Tenn. Code Ann. § 36-6-110.

Different standards of proof are required in certain cases which reflects an allocation of the risk of an erroneous decision and “instruct the factfinder as to the degree of confidence society expects for a particular decision.” *Teter*, 181 S.W.3d at 341 (quoting *Estate of Acuff v. O’Linger*, 56 S.W.3d 527, 537 (Tenn. Ct. App. 2001)).

In *Addington v. Texas*, 441 U.S. 418, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979), the Court, by a unanimous vote of the participating Justices, declared: “The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to ‘instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.’” *Id.*, at 423, 99 S.Ct. at 1808, quoting *In re Winship*, 397 U.S. 358, 370, 90 S.Ct. 1068, 1075, 25 L.Ed.2d 368 (1970) (Harlan, J., concurring). *Addington* teaches that, in any given proceeding, the minimum standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants.

*Santosky*, 455 U.S. at 1395, 102 S.Ct. at 754-55.

Thus, the higher clear and convincing evidence standard is used to allocate the risk of error according to the significance of the consequences, the interests at stake, and in accordance with public policy. The Tennessee General Assembly has imposed the clear and convincing evidence standard in termination of parental rights cases. *Teter*, 181 S.W.3d at 341.

Although the standard applicable to appellate review of trial court decisions that require the higher standard of proof has been stated in various ways, we perceive our task as determining whether this record sustains, by clear and convincing evidence, a finding that termination of Mother’s rights is in C.B.W.’s best interest. *In re Valentine*, 79 S.W.3d at 549, 550 (holding that the existence of grounds was not proved by clear and convincing evidence, that the record did not establish clear and convincing evidence of grounds, and that the proof did not rise to the level of clear and convincing evidence).<sup>10</sup> Regardless of how the standard is expressed, however, there can be no doubt that the burden of proof at trial rests with the party seeking termination of rights, not with the parent who is resisting the petition.

After a thorough review, we conclude that the record does not support the trial court’s determination that there was clear and convincing evidence that termination of Mother’s parental rights is in the child’s best interest. Although Grandmother testified that she believed termination to be the best thing for C.B.W. at this time, she offered no real proof as to the effect on the child of either terminating or not terminating Mother’s rights. Similarly, other witnesses based their best

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<sup>10</sup>We are aware that the Tennessee Supreme Court recently stated the standard of review slightly differently, *In Re F.R.R.,III*, 2006 WL 1215134, at \*2, but nothing in that opinion indicates an intent to modify or overrule *In re Valentine* or to alter the established standard.

interest opinions on Mother's past conduct regarding the child. Although she had failed to visit the child for a number of months or otherwise attempt to maintain a relationship with her, more recently Mother had matured into a responsible person who displayed a desire to establish and maintain a relationship with her daughter.

Some witnesses believed termination to be in the child's best interest based on their conclusion that moving the child to Mother's custody would not be beneficial, an event that was not a consequence of a denial of the petition. One expressed a belief that adoption by Grandmother would provide stability for C.B.W. and was, therefore, in her best interest. However, we cannot discern any instability in the child's life, and there was no proof that she was disturbed by her current arrangement. Any perceived instability appeared to be a concern that Mother might at some time attempt to obtain custody if her rights were not terminated. While that possibility exists, we cannot conclude that the drastic step of terminating Mother's rights is needed to ensure the child's well-being in the meantime. Finally, we note that adoption by Grandmother and cutting off all legal obligations of Mother does not address the question of what would happen to the child if Grandmother dies or becomes unable to care for the child.

We cannot ignore the circumstances that existed when the termination order was entered. At the time of the hearing, Mother and C.B.W. had been visiting weekly for almost a year. They had formed a warm relationship. Mother had clearly become a part, albeit maybe a small part, of the child's life. There was no evidence that these visits were disruptive or troubling to the child. To the contrary, C.B.W. found them enjoyable, and she told other people about Mother. There was no evidence that continuing and expanding Mother's visitation would be harmful to the child.

Although the trial court found that the limited visitation had failed to create a meaningful parent/child relationship, the court did not address the effect of a sudden cessation of those visits. Further, it is clear that Mother would have preferred more visitation, but that Grandmother resisted it. Grandmother set the conditions for visitation and was insistent on exercising control over the situation. We do not doubt that Grandmother was acting with the motive of protecting the child. However, the effect was to hamper the development of a stronger relationship between Mother and C.B.W.

Had C.B.W. been removed from Mother's care by a DCS petition and placed in foster care, efforts to re-unite Mother and the child would have been required. While Grandmother was under no legal obligation to make such efforts, it appears to us that Grandmother was largely responsible for the child's limited contact with Mother. Thus, any deficiency in the relationship between Mother and C.B.W. cannot be entirely attributed to Mother.

Terminating Mother's parental rights would deprive C.B.W. of a relationship with her biological mother, her stepfather, and her baby sister. We find insufficient proof that such a situation is in C.B.W.'s best interest. She can continue to enjoy the love, support, and care of Grandmother and other relatives without excluding another set of people to love her. If all the adults involved

cooperate and act in ways to prevent unnecessary turmoil to C.B.W., her life can be enriched by all these relationships.

#### **IV.**

We reverse the judgment of the trial court and restore Mother's parental rights. We remand this case to the Juvenile Court of Rutherford County for further proceedings consistent with this opinion, including prompt steps to reintroduce Mother and child to each other, using the services of treatment professionals, if needed, to ensure that the process does not become emotionally difficult for the child. We leave to the trial court the details of a visitation arrangement. Costs of this appeal are assessed against the appellee, D.W.

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PATRICIA J. COTTRELL, JUDGE